Individuals and Judges in Defense of the Rule of Law

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The *LM* Court of Justice Grand Chamber ruling of 25 July 2018 (Case C-216/18 PPU) has been long awaited by all those following the development of the so-called rule of law crisis in the EU. It was possibly also a welcome opportunity for the Court of Justice itself, which appears keen to make its mark on this fast-developing field of EU law, after what might have felt like a series of frustrating rulings that made little difference to the situation on the ground (e.g. the ruling on the forced early retirement of Hungarian judges). In many ways, this case illustrates EU constitutionalism at its best: despite not being obliged to do so, the Irish judge made a request under Article 267 TEU, bringing together concerns raised by the pending Article 7 TEU procedure and the more technical and narrow issue of fair trial under Article 47 EU Charter. While the ECJ follows the path opened in *Aranyosi* for assessing the 'real risk of breach' under Article 47 EU Charter, in interpreting that provision it manages to weave in the wider Article 7 TEU contextual concerns as well, thereby considerably strengthening the constitutional status of the right to a fair trial.

At first glance, in *LM* the Court of Justice appears to make decisive strides with regard to the rule of law, stepping up as a key participant in the discussion triggered by reforms to the judiciary in Poland and Hungary: the ECJ has not waited for Article 7 TEU proceedings

to come to an end in order to devise its own tests and assessment mechanisms, inviting Member States' courts to apply them. The *LM* case can certainly therefore be understood as a strong promotion of the role of Member States' courts in assessing the so-called rule of law crisis and related attacks on judicial independence in fellow Member States. However, contrary to what some observers might have expected, the ECJ makes no comment on the quality of the rule of law in Poland. Instead, the significance of *LM* lies in how the ECJ sets up (building on *Aranyosi*) a parallel procedure for domestic judges to address Article 7 TEU-type concerns in relation to the rule of law. For a start, Article 7 TEU documentation is included for the purpose of the abstract stage of the *Aranyosi* test (para 61), and doing so is very likely to lead to a finding of a real risk of breach of the right to a fair trial. However, there is no automatic causality, and it is for domestic courts to undertake this assessment.

The guidance provided by the ECJ focuses on structural issues, specifically judicial independence, with detailed guidance about the nature of external and internal pressure on judges. This could still be clearer, however. Firstly, the ECJ does not specify whether the external pressure criterion applies to the Polish court involved in the given European Arrest Warrant (EAW), to the entire judiciary in Poland, or to all the courts likely to be involved in the EAW case (para 63). Secondly, the ECJ provides no guidance –procedural or substantive – on the expected quality of criminal proceedings, which is the core issue in EAW. Finally, the ECJ's total silence in relation to the European Court of Human Rights and its case law has to be noted here, differing in this respect from *NS* and *Aranyosi*. This might be explained partly by the lack of immediately relevant ECHR case law (unlike in the previous rulings). However, the case law on Article 6 ECHR is plentiful and might have provided valuable further guidance in *LM*, especially noting Articles 52.3 and 53 of the EU Charter which invite the ECJ to refer to the ECHR and its case law when there is a correspondence between the ECHR and the Charter rights.

Unlike the broad perspectives adopted by the EU Commission and the Venice Commission, the ECJ construction of the rule of law in *LM* ultimately focusses on the right to a fair trial. While this may be considered as a very narrow understanding of the rule of law, from a theoretical and contextual perspective, this raises the constitutional status of the right to a fair trial in an unprecedented manner, turning it into both the hallmark of the rule of law and a useful diagnostic tool for assessing the real risk of a breach. The ECJ does so by establishing an explicit continuum between the right to fair trial (Article 47 EU Charter), the principle of judicial independence and the commitment to the rule of law under Article 2 TEU (para 48). Semantically and politically this is not a big, or indeed controversial, step to take and the ECJ can hardly be criticized for activism (especially maybe by the Polish authorities, if this is whom the ECJ has in mind). The significance of this continuum is however far-reaching.

Firstly, it gives the rather abstract value of the 'rule of law' under Article 2 a very clear and concrete meaning, that is easy to understand by judges. Secondly, it arguably invites further normative connections to be established between other Article 2 TEU values and – presumably – all the EU Charter rights, opening up interesting hermeneutic possibilities. This in due course might be a useful way of strengthening the normative status of some of the EU Charter provisions, especially those considered as general claims or objectives

rather than distinct fundamental rights. As can be seen in *LM*, the connection established by the ECJ between Article 47 EU Charter and Article 2 TEU elevates the normative status of the right to a fair trial to that of the absolute prohibition of inhuman treatment (under Article 4 EU Charter). This enhanced normative treatment justifies making an exception to the core principle of mutual trust and mutual recognition underpinning the entire EU law system and the EAW in particular.

More precisely, in practice, only 'a real risk of breach' is enough to justify protective measures (as per *NS* and *Aranyosi*), and further checks as in *LM* (the second step in the test). In this respect, the take-home message of the ECJ in *LM* is that the right to a fair trial – while not framed in absolute terms by the EU Charter – is so important that it requires the same judicial attention and protection as the absolute rights guaranteed under Title 1 (dignity) of the EU Charter (Articles 2, 3, 4 and 5). In so doing, the ECJ makes a welcome and potent addition to this title, highlighting the procedural dimension of human dignity, and completing the construction of these core rights' protection. It also gives courts and individuals a tool – the right to a fair trial – to protect absolute rights when they are at risk due to large scale breaches of the rule of law, as well as (presumably) of other Article 2 values.

As a result, in the normal functioning of the judiciary as seen in *Melloni*, mutual trust can allow a lower level of protection of fair trial, including legal defence rights, in fellow Member States. By contrast, in situations of a real risk of 'systemic generalised deficiencies', the right to a fair trial trumps mutual trust, and checks have to be made on the quality of the trial. In ruling in this way, the ECJ draws a clear line between what can be a healthy level of constitutional pluralism and what can no longer be considered pluralism, but a threat to EU absolute rights (Title 1 EU Charter) and to its foundational values (Article 2 TEU), justifying constitutional distrust.

The *LM* case ultimately reminds us that safeguarding the rule of law is not the exclusive responsibility of the institutions listed under Article 7 TEU: it is also the responsibility of judges and of individuals. This is a message perhaps intended for the EU Commission, which is not known for having been quick to act in this field, and perhaps also an encouragement to those judges in Poland (and Hungary) who are committed to a fair trial. The ECJ's silence about the – actual and possible – roles of the European Court of Human Rights is particularly disturbing and might confirm the quiet competition between the two courts ongoing since the rejection of ECHR accession. Considering the especially strict limitation of individual access to the ECJ, it might be recalled that one court – albeit it the ECJ – might not always be enough for safeguarding the rule of law.

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